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May 1, 2013

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: American Cable Association (“ACA”) *Ex Parte* Filing on the CAF Phase I
Incremental Support Program, WC Docket No. 10-90**

Dear Ms. Dortch:

On April 30, 2013, Ross Lieberman (ACA) and the undersigned, Thomas Cohen (Kelley Drye & Warren LLP), met with Angela Kronenberg, Wireline Legal Advisor, and Rebekah Goodheart, acting Wireline Legal Advisor, to Chairman Clyburn. In the meeting, Mr. Lieberman and Mr. Cohen discussed the following modifications to the Connect America Fund (“CAF”) Phase I Incremental Support Program for 2013, which were proposed by the Commission in a Further Notice of Proposed Rulemaking late last year.¹

Expansion of Eligible Areas and Alteration of the Amount of Support

In the FNPRM, the Commission discussed expanding the eligible areas to include those lacking 4/1 Mbps (“4/1”) broadband service and altering the amount of support from \$775/location.² This amount of support was intended to provide sufficient incentive for the price cap local exchange carriers (“LECs”) to deploy 4/1 broadband in areas that had only lower speed broadband service (i.e. less than 768/200 kbps (“768/200”)).

In the FNRPM, the Commission stated:

¹ See *Connect America Fund*, WC Docket No. 10-90, Further Notice of Proposed Rulemaking, FCC 12-138 (rel. Nov. 19, 2012) (“FNPRM”).

² *Id.*, ¶¶ 9-12 and 29-35.

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Carriers that accepted funds in the first round of Phase I incremental support likely will use those funds to build to lower-cost locations in their territories, leaving generally higher-cost locations remaining, which would raise the average cost to connect to a location in the next round of funding and militate in favor of using a figure higher than \$775. However, *we also note that if we expand our definition of eligible areas, it could reduce the average cost per location.*³

ACA submits that if the eligible areas are expanded to include those without 4/1 service, the amount of support per location should decrease significantly below \$775/location since the average cost of the locations without 4/1 service that the price cap LECs could serve is well below the average cost of locations without 768/200 service. In addition, there are substantially more locations without 4/1 service than without 768/200 service, and, as the Commission noted, the price cap LECs have a natural incentive to serve first the lowest cost locations (that is, those below the average cost).

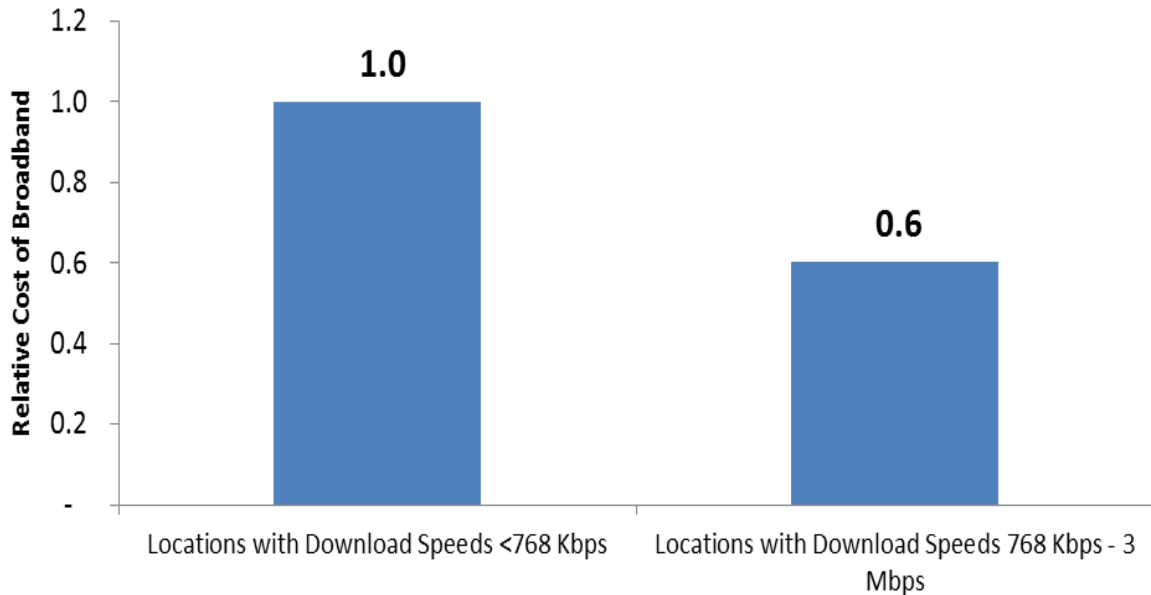
As support for ACA's contention, using the current version of the Commission's Connect America Cost Model ("CACM"), ACA analyzed the difference in costs between locations currently without 768/200 service and those locations with service greater than 768/200 and less than 3 Mbps/768 kbps ("3/768").⁴ From this analysis, ACA determined that the average cost to serve locations with broadband between 768/200 and 3/768 is just 60 percent of the average cost to serve the "below" 768/200 locations (*see* Figure 1). If this cost difference is applied to the CAF Phase I incremental support framework, locations without broadband service between 768/200 and 3/768 should require only 60 percent of the 2012 support amount – or \$468/location (\$775 x 60 percent).

³ *Id.*, ¶ 35 (emphasis added).

⁴ To conduct this analysis, ACA used broadband speeds from the June 2012 National Broadband Map and per location annual cost estimates for CAF Phase I eligible locations from Version 3 of the CACM. The analysis was conducted at the census block group level using the maximum speed for all census blocks with download speeds below 3 Mbps to represent the speed of the census block group. Census blocks included in the National Broadband Map that did not have reported speeds were excluded from the analysis.

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Figure 1: Unserved CAF Phase I Eligible Locations – Relative Cost Index



CAF Phase I Support: \$775/Location

\$468/Location

Oversight and Reporting

For the existing incremental support program, at the time that a price cap LEC elects incremental support, the Commission only requires the carrier to state the amount of support it accepts and identify the areas by census blocks and wire centers where it might deploy broadband.⁵ The program permits a price cap LEC to amend these areas at a later date.⁶ In the FNPRM, the Commission proposes a minor modification to its reporting obligations, requiring a price cap LEC in the annual milestone certifications to include geocoded location information.⁷ ACA supports adoption of this amendment, but, even with it, the oversight and reporting requirements are insufficient to ensure price cap LECs fully abide by the program's requirements. This is particularly the case if the Commission decides to expand the eligible areas, provide a different amount of support for different eligible areas, and, as discussed below, require the price cap LECs to make a matching investment. In essence, with all of these new factors, the existing and proposed oversight and reporting requirements are not sufficient to permit the Commission to track where and how incremental support and matching capital is spent to ensure the program's rules are fully followed.

⁵ See 47 C.F.R. § 54.312(b)(3).

⁶ See *Connect America Fund et al.*, WC Docket No. 10-90, Order, 27 FCC Rcd 8143, ¶ 5 (Wireline Comp. Bur. 2012).

⁷ See FNPRM, ¶ 47.

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Accordingly, ACA recommends that the Commission require a price cap LEC to declare at the time it accepts CAF Phase I support (or shortly thereafter (not more than 90 days)), not only the amount it accepts and the census blocks and wire centers where it will use support, but also the number of 4/1 and 768/200 locations in each census block where support or matching investment will be used.⁸ In addition, once this list is established, the Commission should not permit a price cap LEC to modify it. Finally, for the annual milestone certifications, in addition to providing geocoded location information, a price cap LEC should provide an estimated cost to serve each location in an eligible census block and the actual amount of incremental support and matching investment used for that location to date.

By imposing these requirements at the time support is accepted (or shortly thereafter), the Commission will be able to better track the locations where broadband will be deployed and link to these locations the “varying” amounts of incremental support and matching investment. In addition, by prohibiting modifications, the Commission – and competing providers – will not have to wrestle with circumstances in which the price cap LEC decides to use incremental support in a “new area” – one different from those disclosed when it accepted support – and a competing provider out of necessity needs to contest this designation.

Provision of Matching Private Investment

In a recent *ex parte*, three price cap LECs – CenturyLink, Frontier, and Windstream – committed “that each will match the incremental support it accepts in 2013 with an equal investment of its own capital to extend broadband to unserved locations.”⁹ ACA is heartened by the commitment of these price cap LECs. A matching requirement is essential to ensuring incremental support is distributed efficiently and government subsidies are properly leveraged to expand broadband deployment in unserved areas.

A matching requirement, however, will not be meaningful or effective unless the Commission clarifies how such funding should be spent and adopts adequate transparency and accountability measures.¹⁰ To that end, the Commission should first establish a requirement that for the amount of

⁸ At the time that the price cap LEC identifies each census block where support or matching investment will be used, the Commission should accept challenges as to whether these areas are eligible for support. To the extent that a LEC seeks to challenge an area as eligible to be served, it will initiate the challenge by declaring the census block as one in which it will use incremental support.

⁹ *Ex Parte* from Glen F. Post, III, CEO and President, CenturyLink, Inc., Maggie Wilderotter, Chairman and CEO, Frontier Communications, and Jeff Gardner, President and CEO, Windstream, WC Docket Nos. 10-90 and 05-337 (Apr. 19, 2013).

¹⁰ As discussed earlier in this filing, if the Commission expands the class of eligible areas to 4/1 and provides a different amount of support for locations in these areas, it will create additional complexity in determining whether support is properly spent according to the Commission’s rules. Adding a requirement to track how matching funds are expended adds another layer to

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support accepted in aggregate, a price cap LEC must spend an equal amount of its own capital. Second, the Commission should make clear that price cap LECs are to be held to the same restrictions in spending matching support as they are in spending incremental support. For instance, if incremental support cannot be expended on the deployment of second-mile fiber, then matching funds should not be used (counted) for this purpose. Third, as discussed above, a price cap LEC at the time it accepts incremental support (or shortly afterward) should identify those eligible census blocks where it intends to spend its capital and the number of 4/1 and 768/200 locations in each of those blocks where private investment will be used.¹¹ It also should disclose in its annual reports the capital contribution it makes each year and the locations where this private investment is used.¹²

Determination of Eligible Areas

In the Second Order on Reconsideration,¹³ the Commission addressed a number of issues concerning use of the National Broadband Map to determine unserved locations where incremental support might be used. One of those issues concerned unserved locations in census blocks partially served by an unsubsidized provider, and the Commission clarified that “if the data underlying the Map show that a location is not served by a particular provider, then...the location is ‘shown as unserved’ by that provider.”¹⁴ While ACA continues to believe that the Commission should not expend support in partially served blocks, it understands the rationale behind the Commission’s decision.

ACA also continues to support the Commission adopting a challenge process – one where either a price cap LEC or a competitive provider can challenge designations on the National Broadband Map. However, the challenge process should have some constraints if the data on the Map is to have relevance and providers are to have a reason to participate in populating it with data. To that end, the Commission should make clear that where there is no underlying location specific data in a census block on the most recent version of the National Broadband Map, it will only accept

this complexity and hence increases the need to establish adequate oversight and reporting requirements, such as those proposed herein.

¹¹ ACA recognizes that some of these areas may be the same areas as those where price cap LECs are using public support because the actual cost to serve a location may be greater than the incremental support allocation and require some private investment.

¹² As with incremental support, the Commission should not consider capital contributions to be matching if the price cap LEC has already committed to expend them under a current capital improvement plan for broadband deployment or pursuant to merger commitment or similar regulatory obligation. *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 et al., 26 FCC Rcd 17663, 17720-1, ¶ 146 (2011), *pets. for review pending sub nom. In re: FCC 11-161*, No. 11-9900 (10th Cir. filed Dec. 18, 2011).

¹³ *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Second Order on Reconsideration, 27 FCC Rcd 4648 (2012).

¹⁴ *Id.*, ¶ 11.

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challenges as to whether a competitor provider offers service in the census block. In other words, a price cap LEC should not be able to provide its own location specific information within a census block for the purpose of classifying a block as partially served and eligible for incremental support. This, in fact, is what CenturyLink has proposed in its recent *ex parte*.¹⁵ Should the Commission accept CenturyLink's proposal, it would mean the National Broadband Map has little credence and open virtually any census block to a challenge on a location by location basis. This would sap the resources of both the Commission and competitive providers. As such, CenturyLink's proposal or any similar challenge should be rejected.

Should you have any questions about ACA's analysis, please contact me.

Sincerely,



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cc: Angela Kronenberg
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¹⁵

See Ex Parte from Melissa E. Newman, Senior Vice President, Federal Policy and Regulatory Affairs, CenturyLink, WC Docket Nos. 10-90 and 05-337 at 2 (Apr. 15, 2013).